

MINUTES

**NATIVE AMERICAN GRAVES PROTECTION AND
REPATRIATION REVIEW COMMITTEE**

FORTY-FOURTH MEETING

JUNE 21-22, 2011

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Background

The Native American Graves Protection and Repatriation Review Committee was established under the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 et seq., which was signed into law by President George Bush on November 16, 1990.

Pursuant to 25 U.S.C. 3006 (c) and (h), the Review Committee is responsible for –

1. Designating one of the members of the committee as chairman;
2. Monitoring the inventory and identification process conducted under sections 5 and 6 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;
3. Upon the request of any affected party, reviewing and making findings related to-
 - A. The identity or cultural affiliation of cultural items, or
 - B. The return of such items;
4. Facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;
5. Compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;
6. Consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;
7. Consulting with the Secretary in the development of regulations to carry out this Act;
8. Performing such other related functions as the Secretary may assign to the committee;
9. Making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated; and
10. Submitting an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

The Review Committee is organized and administered according to the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix (2006).

Six Review Committee members are appointed by the Secretary of the Interior from nominations by Indian tribes, Native Hawaiian organizations, traditional Native American religious leaders, national museum organizations, and scientific organizations. One Review Committee member is appointed by the Secretary from a list of persons developed and unanimously approved by the other members.

The Review Committee reports to the Secretary of the Interior. Under the Review Committee's charter, the Manager, National NAGPRA Program, National Park Service (NPS) or a designee serves as the Designated Federal Officer (DFO) to the Review Committee. The DFO oversees the activities of the Review Committee and coordinates NPS administrative and staff support to the Review Committee on behalf of the Secretary of the Interior.

Additional information about the Review Committee – including the Review Committee's charter, membership, meeting protocol, and dispute procedures – is available at the National NAGPRA Website, <http://www.nps.gov/history/nagpra> (click on "Review Committee").

Notice of this Review Committee meeting was published in the Federal Register on November 16, 2010 (Vol. 75, Number 220, pages 70028-70029).

The 44th Meeting of the Review Committee

The 44th meeting of the Native American Graves Protection and Repatriation Review Committee was called to order by Ms. Rosita Worl, Chair, at 8:50 a.m., Tuesday, June 21, 2011. Mr. Tarler confirmed the attendance of the Review Committee members. Ms. Atalay was absent, due to tribal ceremonial commitments. Mr. Wright, Jr., joined the meeting at 10:50 a.m. on June 21, 2011, having been delayed by travel complications.

Ms. Worl welcomed the newest members of the Review Committee, both of whom were appointed to four-year terms by the Secretary of the Interior on April 28, 2011. Mr. Alexander (Alec) Barker, Director of Art and Archeology and Adjunct Professor in Anthropology, Art and Archeology at the University of Missouri, was nominated by the American Anthropological Association, the American Association of Museums and the Society for American Archeology. Ms. LindaLee Kuuleilani (Cissy) Farm, a partner in Goodsill Anderson Quinn & Stifel, was nominated by the Natural Science Collections Alliance.

Chief Sid Hill, Tadadaho, Onondaga Nation of New York, offered a traditional welcome to open the meeting on Tuesday, June 21, 2011. Mr. Pete Jemison, Seneca Nation of New York, offered a traditional welcome to open the meeting on Wednesday, June 22, 2011.

Review Committee members present –

Ms. Rosita Worl – Chair
Mr. Alexander (Alec) Barker
Ms. LindaLee (Cissy) Kuuleilani Farm
Mr. Eric Hemenway
Mr. Adrian John
Mr. Mervin Wright, Jr.

Designated Federal Officer present –

Mr. David Tarler, Training and Civil Enforcement Coordinator, National NAGPRA Program

National Park Service/Department of the Interior staff in attendance –

Ms. Sherry Hutt, Program Manager, National NAGPRA Program, National Park Service
Ms. Lesa Koscielski, Contractor, National NAGPRA Program, National Park Service
Ms. Carla Mattix, Division of Parks and Wildlife, Office of the Solicitor, Department of the Interior
Mr. Stephen Simpson, Division of Indian Affairs, Office of the Solicitor, Department of the Interior

Persons in attendance during part or all of the meeting (names and affiliations as provided by attendees) –

Ms. Christine Abrams, Haudenosaunee Standing Committee, Tonawanda Band of Seneca Indians of New York
Ms. Lisa Anderson, New York State Museum, Albany, NY
Mr. Bill Billeck, Smithsonian Institution, National Museum of Natural History, Washington, DC
Ms. Rebecca Brave, Osage Nation, Oklahoma, Pawhuska, OK
Ms. Jacqueline Cook, Confederated Tribes of the Colville Reservation, Washington
Ms. Adele DeRosa, Rochester Museum and Science Center, Rochester, NY
Ms. Stacey Espenlaub, University of Pennsylvania, Philadelphia, PA
Ms. Kelly Ferguson, Peabody Museum of Archaeology & Ethnology, Cambridge, MA
Ms. Carrie Garrow, Center for Indigenous Law, Government & Citizenship, Syracuse, NY
Mr. Anthony Gonyea, Onondaga Nation of New York, Nedrow, NY
Ms. Wendy Gonyea, Haudenosaunee Standing Committee, Onondaga Nation of New York, Nedrow, NY
Ms. Rae Gould, Nipmuc Nation & University of Massachusetts – Amherst, Amherst, MA
Chief Sid Hill, Tadadaho, Onondaga Nation of New York
Mr. Jordan Jacobs, American Museum of Natural History, New York, NY
Mr. Pete Jemison, Seneca Nation of New York
Ms. D. Bambi Kraus, National Association of Tribal Historic Preservation Officers (NATHPO), Washington, DC
Mr. Curtis Lazore, Mohawk Nation, Rooseveltown, NY
Ms. Diana Loren, Peabody Museum of Archaeology & Ethnology, Cambridge, MA
Ms. Jennifer Murray, Smithsonian Institution, National Museum of the American Indian, Washington, DC
Ms. Nell Murphy, American Museum of Natural History, New York, NY
Mr. Angela Neller, Wanapum Heritage Center, Ellensburg, WA
Ms. Bonnie Newson, Penobscot Tribe of Maine, Smithsonian Institution, Washington, DC
Mr. Stuart Patterson, Haudenosaunee Standing Committee, Tuscarora Nation of New York
Mr. Douglas Pippen, State University of New York – Oswego, NY
Ms. Margo Schwadron, National Park Service, Southeast Archeological Center, Tallahassee, FL
Ms. Lauren Sieg, Smithsonian Institution, National Museum of the American Indian, Washington, DC
Mr. Chuck Smythe, National Park Service, Northeast Region, Boston, MA

Ms. Jacquetta Swift, National Museum of the American Indian, Washington, DC
Mr. Steve Thomas, Haudenosaunee Standing Committee, Onondaga Nation of New York, Nedrow, NY
Mr. Fred York, National Park Service, Seattle, WA

Comments by the Designated Federal Official

On behalf of the Department of the Interior, Mr. Tarler welcomed Mr. Alexander Barker and Ms. LindaLee Farm to the Review Committee. Mr. Tarler introduced the National NAGPRA Program staff present at the meeting. Mr. Tarler congratulated Ms. Worl for receiving the Lifetime Achievement Award, and the honor of Rosita Worl Day on April 14, 2011, at the 76th Annual Tribal Assembly of the Central Council of Tlingit and Haida Indian Tribes of Alaska in April 2011.

Mr. Tarler acknowledged the hosts for this meeting and thanked them for their gracious hospitality: the Haudenosaunee Standing Committee on Burial Rules and Regulations, the Onondaga Nation of New York, the Syracuse University College of Law, and coordinator Ms. Christine Abrams of the Seneca Nation of New York. Ms. Abrams invited everyone at the meeting to the Onondaga Nation territory for a traditional dinner and social dance on the evening of June 21, 2011. Ms. Carrie Garrow, Executive Director, Center for Indigenous Law, Governance, & Citizenship, Syracuse University College of Law welcomed the Review Committee, National NAGPRA Program staff, and the audience to Syracuse University.

Report: Responses to the Five Recommendations of the Government Accountability Office (GAO) in the Report *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act* (No. GAO-10-768)

Presentation of Report

Ms. Hutt stated that, in July 2010, the Government Accountability Office (GAO) issued a report, *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act*. Ms. Hutt and Mr. Simpson provided an update on the status of the five recommendations made by the GAO in the report.

- Recommendation One: The GAO requested that Federal agencies review their resources, needs and timelines necessary to come into compliance with NAGPRA Section 5 (summaries) and Section 6 (inventories). Ms. Hutt stated that all Federal agencies have done their initial summaries and inventories. This recommendation would require them to review existing summaries and inventories for accuracy and completeness, conduct consultation, and complete revisions when warranted. Ms. Hutt stated that all Federal agencies were to respond to this recommendation through their respective Secretaries by the first week of May 2011. Those Interior responses were then compiled and are under review by the Department of Interior for submission to Congress, specifically the U.S. Senate Committee on Indian Affairs and the House Committee on Natural Resources. The deadline for completion is June 30, 2011. The National NAGPRA Program will update the Review Committee on these responses following their receipt by Congress. Ms. Hutt stated that the posture of each Federal agency on this matter is based on the size and complexity of its collection, and that the information received in response to this recommendation will contain a rather candid description of the needs of agencies in order to come up to speed on summaries and inventories.
- Recommendation Two: The GAO requested that Federal agencies develop a timetable for the expeditious publication of Notices of Inventory Completion for all remaining Native American human remains and associated funerary objects that have been culturally affiliated in inventories. The process and timeline for completion of recommendation two was the same as for recommendation one, and compliance is anticipated. Ms. Hutt stated that this recommendation would heighten the attention that is given to NAGPRA compliance, and the responses to recommendation two will vary by agency.
- Recommendation Three: The GAO requested that the National NAGPRA Program, in conjunction with the DOI Office of the Solicitor, should reassess whether Alaska Native Claims Settlement Act (ANCSA)

corporations should be considered as “Indian tribes” for the purposes of carrying out NAGPRA.

Mr. Simpson stated that, in considering this issue, the Solicitor’s Office reviewed the statute, the legislative history of the statute, the regulations, and the BIA list and concluded in an opinion issued on March 18, 2011, that the plain language of NAGPRA, as reinforced by the legislative history of NAGPRA, specifically excluded Alaska Native Corporations from the definition of Indian tribes for purposes of NAGPRA.

Consequently, inclusion of those corporations as “Indian tribes” in the regulations was contrary to the statute. The Solicitor’s Office recommended that the National NAGPRA Program work as quickly as possible to remedy that situation. In response to this opinion, the National NAGPRA Program currently has an interim final rule going through the surname and signature process at the Department. The rule removes and reserves the definition of “Indian tribe” from the regulations, leaving the statutory definition to control the meaning of the term. Mr. Simpson stated that, as noted in the opinion, Alaska Native villages and tribes can still be assisted by ANCSA corporations, and that ANCSA corporations may be joined as requestors for and recipients of cultural items under NAGPRA. Ms. Hutt stated that the DOI reported to the GAO on the action taken, the GAO accepted the response, and the status of recommendation three is closed.

- Recommendation Four: The GAO requested that the National NAGPRA Program strictly adhere to the process prescribed in the Act to ensure that all Review Committee nominations are properly screened to confirm that the nominees and nominating entities meet statutory requirements. Ms. Hutt stated that in reference to recommendation four, the GAO report did not specifically identify any missteps taken by the National NAGPRA Program in past nominations. In an effort to identify and then address any problems, Ms. Hutt communicated with the authors of the report, but no additional information was provided. Ms. Hutt stated that, in 2008, the National NAGPRA Program made changes to the process for selection of Review Committee members. Although these procedures were disclosed to the GAO, they were not included in the report. The procedures were reiterated in the National NAGPRA Program’s response, which the DOI provided to the GAO, and which the GAO accepted. Thus, the status of recommendation four is closed. Ms. Hutt summarized the nomination process, as follows: Solicitations for nominations are published in the Federal Register. In response to the solicitations, the National NAGPRA Program receives nominations from Indian tribes, Native Hawaiian organizations, Native American religious leaders, and national museum and scientific organizations. All information submitted with the nomination is turned over to the Secretary of the Interior through the Policy Office of the NPS. After the nominees are vetted by the White House, selection of Review Committee members is entirely within the discretion of the Secretary. Ms. Hutt stated that in order to fill the two positions on the Review Committee that are to be held by traditional Indian religious leaders, the National NAGPRA Program is required to confirm that the nominee is a traditional religious leader. Ms. Hutt stated that the National NAGPRA Program does not substantiate or qualify the responses. Ms. Hutt acknowledged with regret that the inquiry may be offensive to some nominators and nominees.
- Recommendation Five: First, the GAO requested that DOI ask each Federal agency to report their repatriation data to the National NAGPRA Program on a regular basis, but no less than annually, for each Notice of Inventory Completion they have published or will publish. Ms. Hutt stated that DOI complied with the GAO recommendation, beginning in December 2010. Since then, several meetings between the National NAGPRA Program and the various bureaus have been held to discuss a template and timeline for transmission of the information. Ms. Hutt stated that the status of this part of recommendation five was closed. Second, the GAO requested that, upon receipt of the above information, the National NAGPRA Program forward it to the Review Committee to provide to Congress. Ms. Hutt stated that the information was provided to the Review Committee in the National NAGPRA Program’s FY 2010 Final Report for inclusion by the Review Committee in its report to Congress for 2010. Ms. Hutt stated that the status of the second part of recommendation five will be closed upon submission of the Review Committee’s Report to Congress for 2010.

Review Committee Discussion

Ms. Worl stated the Review Committee’s initial comments on the GAO report, made at the November 2010 meeting in Washington, DC, were included in the Review Committee’s Report to Congress for 2010. Ms. Worl explained that regarding the issue of ANCSA corporations in the GAO report, Alaska Native corporations are corporations created by Congress for the settlement of aboriginal land claims in Alaska. These for-profit corporations are unique in that they have many attributes of tribes and are recognized by Congress as tribes for special statutory purposes in over one hundred legislative acts. Ms. Worl thanked Ms. Hutt for the updated information on the recommendations.

Ms. Worl expressed concern over the report of lack of compliance by some Federal agencies in the GAO report. Ms. Hutt stated, as noted in the GAO report, that Federal agencies have different rates of compliance. In November 2010, the National NAGPRA Program provided the Review Committee with a sample template of the data, broken down by Federal agency, which the program is seeking to obtain for the FY 2011 report. At the November 2011 meeting, after the Review Committee has a chance to review that information, the National NAGPRA Program would be happy to provide any additional information necessary. Ms. Hutt stated that the National NAGPRA Program does work closely with Federal agencies' NAGPRA representatives and encourages them to appear before the Review Committee to provide updates on their successes and barriers to implementation.

Discussion: Oversight Hearing on *Finding Our Way Home: Achieving the Policy Goals of NAGPRA* (June 16, 2011)

Ms. Hutt stated that on June 16, 2011, the Senate Indian Affairs Committee held an Oversight Hearing on *Finding Our Way Home: Achieving the Policy Goals of NAGPRA*, during which the issue of repatriation was discussed, including repatriation at the Smithsonian Institution. The hearing was chaired by Senator Akaka (D-HI), who was joined by Senators Udall (D-NM) and Murkowski (R-AK). Ms. Hutt stated that a recorded webcast of the hearing was available on the Senate Indian Affairs Committee website, in addition to the full written testimony of each presenter.

Three panels provided testimony. The first panel was Ms. Anu Mittal, Director, U.S. GAO, Natural Resources and Environment, who summarized the two GAO reports — *NAGPRA: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act* (No. GAO-10-768) and *Smithsonian Institution: Much Work Still Needed to Identify and Repatriate Indian Human Remains and Objects* (No. GAO-11-515). Ms. Hutt stated that the GAO summary contained updated statistics available on the National NAGPRA Program website. Responding to questions from Senator Murkowski, Ms. Mittal identified the following Federal agencies as best performers with 75 to 85 percent completion rates: the Department of Defense, U.S. Army Corps of Engineers; the Department of the Interior, National Park Service; and the Department of Agriculture, Forest Service. Although other factors came into consideration, the GAO noted each of the highlighted agencies had identified their collections, and has a centralized NAGPRA office, decision-making policies in place to enable successful tribal consultation, and the ability to move forward with determinations of cultural affiliation and notice publication.

The second panel was Ms. Peggy O'Dell, Deputy Director, NPS, and Mr. Kevin Gover, Director of the National Museum of the American Indian (NMAI). Ms. Hutt stated that Ms. Jacquetta Swift, NMAI, would present a summary of repatriation efforts at the NMAI at this Review Committee meeting. Ms. Hutt stated the NPS testimony summarized progress made in NAGPRA implementation, and this summary is contained in the National NAGPRA Program's FY 2011 Midyear Report to the Review Committee. Ms. Hutt stated that during her presentation, Ms. O'Dell summarized the grants activity within the National NAGPRA Program. Ms. Hutt explained that the National NAGPRA Program awards two types of grants: noncompetitive repatriation grants, which are awarded throughout the fiscal year; and competitive consultation/documentation grants, which are awarded in July. Repatriation grants cover repatriation expenses, including travel and ceremonies. The maximum repatriation grant amount is \$15,000. The number of consultation/documentation grants awarded depends upon the total grant funds available after repatriation grants are satisfied. The maximum consultation/documentation grant amount is \$90,000. During the hearing, Ms. O'Dell stated that the National NAGPRA Program has never denied a repatriation grant. Ms. Hutt reported that, while this statement is accurate, what may not have been clear during the hearing was the fact that repatriation grant requests have increased significantly over the past few years, while the amount of funding available for grants has remained the same. As a result, the funding of consultation/documentation grants has decreased. This year, the grants panel's recommended funding for consultation/documentation grants exceeded the funds available. Thus, some deserving consultation/documentation grant requests will not be funded. Ms. Hutt stated she hoped the National NAGPRA Program would have an opportunity during follow-up communications with the Senate Indian Affairs Committee to clearly explain the difference between the two types of grants and address the amount of funding requested through grant applications each year.

The third panel included The Honorable Mark Macarro, Chairman of the Pechanga Band of Luiseno Indians; The Honorable Mervin Wright, Jr., Vice-Chairman of the Pyramid Lake Paiute Tribe; and Mr. Ted Isham, Cultural

Preservation Manager and Tribal Historic Preservation Officer for the Muscogee (Creek) Nation. These individuals provided detailed comments on the experiences of those in Indian country in dealing with museums, universities and Federal agencies on NAGPRA compliance matters. Ms. Hutt recommended to the Review Committee and the audience that they read the written comments in full.

Mr. Wright, Jr., stated he felt the theme of the hearing, “*Finding Our Way Home: Achieving the Policy Goals of NAGPRA*”, was a fitting one. Mr. Wright, Jr., stated that a lot of the issues and difficulties encountered in implementing NAGPRA have been discussed at the committee level. Mr. Wright, Jr., stated that, at the November 2010 meeting, he raised the point that after considering the database and status reports, it seems as though a number of collections are not being effectively repatriated. Mr. Wright, Jr., stated that consideration of the decision-making process in NAGPRA is important, and once that issue is addressed, difficulties being faced by tribes can hopefully be identified and addressed. Mr. Wright, Jr., summarized his testimony at the hearing. Congress had the right intention when it enacted a law to address the human right of Native Americans to have their ancestors treated with respect, including the right to be buried and stay buried. Mr. Wright, Jr., described his concerns with 43 C.F.R. 10.11; the need to amend the definition of Native American in the statute to include the phrase “or was”; and the need to specially protect burial grounds as sacred sites. Mr. Wright, Jr., stated that the hearing record would remain open for two more weeks, and he encouraged tribal leaders and others to submit their comments.

Ms. Worl stated that, regarding 43 C.F.R. 10.11, the Review Committee had recommended in their report to Congress that associated funerary objects be transferred together with human remains. In addition, the Review Committee has consistently supported amending the definition of Native American in the Act to include the phrase “or was” in numerous past reports to Congress.

Presentation: The GAO Report Smithsonian Institution: Much Work Needed to Identify and Repatriate Indian Human Remains and Objects (No. GAO-11-515)

Presentation

Ms. Jacquetta Swift, Repatriation Manager, National Museum of the American Indian (NMAI), thanked the Review Committee and National NAGPRA Program staff for the opportunity to speak, the Syracuse University College of Law for hosting the meeting, and the Haudenosaunee for the warm welcome. Ms. Swift stated that the Smithsonian Institution is not subject to NAGPRA. The repatriation efforts at the Smithsonian Institution are guided by the National Museum of the American Indian (NMAI) Act. The NMAI Act was the first piece of Federal legislation on repatriation, and impacted only the Smithsonian Institution’s 19 museums, 3 research centers, and 1 national zoo. Of those, only two museums have collections that fall under the NMAI Act, the NMAI and the National Museum of Natural History (NMNH). Ms. Swift stated she would speak on behalf of the repatriation efforts at NMAI and provide an overview of the recent GAO report and recommendations regarding the Smithsonian Institution’s repatriation efforts.

The GAO report on repatriation efforts at the Smithsonian Institution took 17 months to complete and was released on May 25, 2011. While the report acknowledged that tribes were generally satisfied with the Smithsonian Institution’s repatriation program, the GAO made one recommendation to Congress and four recommendations to the Smithsonian Institution. Recommendation to Congress: The GAO recommended that Congress may wish to consider ways to expedite the Smithsonian Institution’s repatriation process. Recommendations to the Smithsonian Institution: The GAO recommended that, one, the Smithsonian Institution’s Repatriation Review Committee’s jurisdiction be expanded to include the NMAI, and not just the NMNH; two, that the Smithsonian Institution report to Congress on its repatriation activities; three, that the Smithsonian Institution establish an independent appeals process; and four, that the Smithsonian Institution develop a policy for human remains and objects that cannot be culturally affiliated.

Ms. Swift stated that the Smithsonian is working on each of these recommendations. Regarding the fourth recommendation, the Smithsonian Institution would like to seek public input, and invites questions or comments from the Review Committee and others. Ms. Swift stated that the NMAI Act uses a reasonable basis standard for determining cultural affiliation, and not a preponderance standard. At the NMAI, the highest priority is the return of all human remains and associated funerary objects to their communities of origin, both nationally and internationally.

Although the NMAI Act does not have a formal written policy on culturally unaffiliated human remains and associated funerary items, in practice the NMAI has been addressing these types of returns for over 15 years as part of its standard operating procedures. This information was provided to the GAO; however, it did not appear in the final report. Ms. Swift stated that the Smithsonian Institution hopes to have drafted such a policy by September 2011.

Review Committee Questions and Discussion

Ms. Worl asked for an explanation of the differences between the estimated number of human remains and objects repatriated from the NMAI and the NMNH. Ms. Swift stated that she was speaking only on behalf of the NMAI; however, there were a great number of differences between the two institutions, including collection practices, types of current collections, and repatriation policies. Ms. Swift pointed out that each museum would develop its own policy on culturally unaffiliated human remains and objects. Ms. Worl acknowledged the repatriation efforts of the NMAI and the NMNH, and encouraged the Smithsonian Institution to consider NAGPRA's rule on culturally unidentifiable human remains as an example.

Action Item: Presentation, Discussion, and Approval of the Review Committee's Annual Report to Congress for 2010, as Required by NAGPRA

The following discussion was held on Tuesday, June 21, 2011. Mr. Wright, Jr., was absent.

Review Committee Motion

Mr. John made a motion to adopt the Review Committee's Report to Congress for 2010. Mr. Hemenway seconded the motion. Ms. Worl stated the motion was open for discussion.

The Review Committee discussed the report. Mr. Barker raised two items for discussion. First, regarding the suggestion that the Review Committee's determinations should be binding, Mr. Barker stated that the nature of the Review Committee is to facilitate resolution of disputes between Native communities and museums and Federal agencies. Creating a binding authority does not facilitate resolution of a dispute; it simply enforces a decision, which may widen the adversarial gap. In addition, Mr. Barker stated he did not believe it is within the Review Committee's purview to expand beyond the boundaries set by FACA to allow an advisory committee to have binding authority on parties. Second, Mr. Barker raised a concern that many of the criticisms of the GAO report were rejected by the Review Committee, specifically the concern raised that some view the Review Committee as having an unfair bias. Mr. Barker stated that when concerns are raised, a certain amount of critical self-reflection needs to be done. Mr. Barker stated that the perception and maintenance of fairness is crucially important, to balance the valid interests of Indian tribes and Native communities, museums, scientific organizations, and the public. Ms. Worl thanked Mr. Barker for his comments, and she stated that perhaps it was time to once again discuss the authority of the committee.

Ms. Mattix asked for clarification regarding two sections of the report. On page 16, under recommendation 2, Ms. Mattix asked the committee to consider rewording the recommendation, based on the intent of the recommendation, as Federal agencies are not subject to civil penalties. On page 17, Ms. Mattix stated that although the intent of recommendation 6 is clear from the title, the committee may wish to ensure that the explanation in the paragraph is clear. Mr. Barker asked for clarification of recommendation 9.

Ms. Worl stated that she would like to suspend the discussion of the report until the following day in order to address these concerns. Ms. Worl appointed Mr. Hemenway and Mr. John to rework those sections of the report for discussion the following day.

The following discussion was held on June 22, 2011. Mr. Wright, Jr., was present.

Mr. John described the changes made to the draft report as a result of comments and questions from the first day of the meeting. After discussion, Recommendations 2 and 6 were amended to read as follows:

Recommendation 2: DEVELOP COMPLIANCE MECHANISMS FOR FEDERAL AGENCIES. As the GAO report so clearly demonstrated, there are key Federal agencies that have still not complied with the law. We recognize that there is a range of reasons why Federal agencies are not in compliance, some of which relate to staffing and funding shortages. The Committee recommends that there be the development of a mechanism for Federal agencies to come into compliance. We envision that this recommendation would work in connection with our recommendation for increased funding for grants to tribes to work with Federal agencies to achieve compliance.

Recommendation 6: FUTURE GAO STUDY ON MUSEUM COMPLIANCE. As highlighted in our summary comments above, related to the GAO report on NAGPRA, the Review Committee found many of the points highlighted in the Report to be helpful — particularly the recommendations offered in the report to ensure that Federal agencies, some of whom are still out of compliance 20 years after the enactment of this law, take active steps toward compliance. We recommend that the GAO undertake a similar study of museum compliance.

In addition, Recommendation 9 was deleted in its entirety.

Review Committee Motion

Mr. John made a motion to accept Recommendation 2, as amended. Ms. Farm seconded the motion. The motion was adopted by a unanimous vote (6-0).

Review Committee Motion

Mr. John made a motion to accept Recommendation 6, as amended. Ms. Farm seconded the motion. The motion was adopted by a unanimous vote (6-0).

Review Committee Motion

Mr. John made a motion to strike recommendation 9. Ms. Farm seconded the motion. The motion was adopted by a unanimous vote (6-0).

Review Committee Motion

Mr. John made a motion to adopt the Review Committee's Report to Congress for 2010, as amended. The motion was seconded by Ms. Farm. The motion was adopted by a vote of three in favor (Mr. Hemenway, Mr. John, and Ms. Worl), one opposed (Mr. Wright, Jr.), and two abstentions (Mr. Barker and Ms. Farm). Mr. Barker and Ms. Farm each stated that they participated in drafting amendments to the report in order to facilitate the discussion, but abstained from the final vote as they were not members of the Review Committee during the period covered in the report.

Mr. Wright, Jr., stated his "no" vote was due to his objection to wording under the section titled "Comments on 43 CFR 10.11." Mr. Wright, Jr., stated that he disagreed with the wording in the second paragraph, "was overall pleased with the 43 CFR 10.11 Final Rule," and added he was aware of objections to the rule both from the scientific community and the tribal community.

Review Committee Motion

Mr. Wright, Jr., made a motion to bring discussion of the Review Committee's Report to Congress for 2010 back to the table. Ms. Worl confirmed that this followed proper procedure, as he voted against its adoption. The motion was seconded by Mr. John. The motion was adopted by unanimous vote (6-0).

Review Committee Motion

Mr. Wright, Jr., made a motion to amend the first sentence in the second paragraph of the section titled "Comments on 43 CFR 10.11" to read "The Committee feels that several points require further clarity to greatly improve the rule." The motion was seconded by Mr. John. The motion was adopted by unanimous vote (6-0).

Review Committee Motion

Mr. John made a motion to adopt the Review Committee's Report to Congress for 2010, as amended. The motion was seconded by Ms. Farm. The motion was adopted by a vote of four in favor (Mr. Hemenway, Mr. John, Ms. Worl, and Mr. Wright, Jr.) and two abstentions (Mr. Barker and Ms. Farm).

Report: National NAGPRA Program Report on the Implementation of NAGPRA in FY 2011

Presentation of Report

Ms. Hutt summarized the activities of the National NAGPRA Program for the first half of FY 2011. Ms. Hutt stated the midyear and end-of-year reports for the National NAGPRA Program are presented in draft form for the Review Committee's consideration. Following input from the committee, the final versions are then posted on the National NAGPRA Program website.

Ms. Hutt stated that on June 21, 2011, the National NAGPRA Program published its 2,001st notice, a true milestone. Those 2,001 notices represent 45,000 individuals, over one million associated funerary objects, and hundreds of cultural items, sacred objects, objects of cultural patrimony, and objects that are both cultural patrimony and sacred. In large part, this accomplishment is due to the efforts of Ms. Jaime Lavallee, Notice Coordinator, who was responsible for publishing 830 of the notices.

Ms. Hutt stated that the 2011 grant recipients will soon be receiving their award letters. For the first time since 2006, the grants panel recommended funding for grants that exceeded the funds available. In part, this is due to the fact that the number of repatriation grants has significantly increased. Ms. Hutt stated that in recognition of the current hard financial times, the National NAGPRA Program now awards grants to Indian tribes working to repatriate from Federal agencies. In addition, the outreach efforts of Ms. Sangita Chari, Grants Coordinator, have resulted in an increased number and higher quality of both repatriation and consultation/documentation grant requests.

Ms. Hutt stated that Ms. Mariah Soriano, Database and Website Coordinator, is now responsible for administering seven databases. While Ms. Soriano at times has the assistance of qualified interns, she is responsible for creating, maintaining, and updating each of the seven databases. Ms. Hutt gave a brief description of the databases, which can be found on the National NAGPRA Program website at: <http://www.nps.gov/nagpra/ONLINEDB/index.htm>. The databases include: the Native American Consultation Database (NACD), the Notices of Inventory Completion (NIC) Database, the Notices of Intent to Repatriate (NIR) Database, the Notices of Intended Disposition (NID) Database, the Culturally Unidentifiable (CUI) Native American Inventories Database, the Culturally Affiliated (CA) Native American Inventories Database, and the Summaries Database. Ms. Hutt stated that Ms. Soriano was very active in the role of providing information to the GAO for its report, and is now working to incorporate database updates that were submitted during that time. In addition, Ms. Soriano is working to link the information between databases, where applicable, and she is working to implement a user-reporting interface system, whereby updates are entered by museum and Federal agency personnel and then uploaded to the databases by Ms. Soriano. This user/webmaster arrangement will facilitate up-to-date information within the databases. Ms. Hutt stated that another data management project underway within the National NAGPRA Program is the digitization of inventories and summaries. These digital files can then be uploaded to the website for easier user access. Ms. Hutt stated that the goal is to have all individuals listed as culturally affiliated in inventories also listed in Federal Register notices. With more information available on the website, discrepancies can be easily found and addressed, leading to more successful implementation of NAGPRA.

Ms. Hutt stated that, as Mr. Bob Palmer was no longer the NAGPRA civil penalty investigator, the National NAGPRA Program is trying to arrange for a contractor to do civil penalty-related work.

Review Committee Questions and Discussion

Ms. Worl asked for a summary of the webinars offered by the National NAGPRA Program and for a report on feedback from participants. Ms. Hutt stated webinars were a budget-friendly method of offering training to a wide variety of people, saving travel costs for both participants and National NAGPRA Program staff. Thus far in FY 2011, the National NAGPRA Program offered a series of webinars with attendance ranging from 25 to 200 individuals per webinar. Topics offered included grants, databases, notices, and regulations. Upcoming webinars include *Integrating 43 C.F.R. 10.11, Final Rule, the Disposition of Culturally Unidentifiable Human Remains into the NAGPRA Process* on July 20, 2011, and *Coordinating Compliance with Section 3 of NAGPRA and Section 106 of the National Historic Protection Act* on September 15, 2011. Ms. Hutt stated that the National NAGPRA Program takes the Review Committee's request for evaluation of the training/webinar program very seriously and

hopes to have feedback for the Review Committee at an upcoming meeting. Ms. Worl asked that the report include the number of individuals who attended each training. Ms. Hutt stated that information would be included in the final FY 2011 Midyear Report.

Ms. Worl stated the Review Committee has asked that an update on the status of disputes be included in the National NAGPRA Program reports. Ms. Hutt stated that the dispute information was prepared by Ms. Sally Butts and presented to the Review Committee at the November 2010 meeting in Washington, DC. Once the report is reviewed by counsel, it will be provided once again to the Review Committee and posted to the National NAGPRA Program website. Ms. Hutt stated that counsel have been quite busy working on three pieces under regulatory review: amendment of the regulations dealing with the definition of Indian tribe at 43 C.F.R. 10.2 (b), which is under review at the Department; minor amendments of the regulations, which are under review at the Department; and 43 C.F.R. 10.7, disposition of unclaimed human remains on Federal lands, which has been submitted to the Department to be published as a proposed rule. Ms. Hutt asked for guidance from the Review Committee regarding timing of publication of the proposed rule so as to best receive comments from the Review Committee as a whole. After discussion, the Review Committee members expressed their preference that the proposed rule be published as expeditiously as possible, and if necessary, the Review Committee would meet by teleconference during the comment period in order to discuss the proposed rule and submit their comments.

Discussion of Action Items from November 2010 Review Committee Meeting

Ms. Hutt reviewed the action items from the November 2010 Review Committee meeting, and reported their status as follows:

- *Materials for the Review Committee meeting provided to the Review Committee members electronically and posted on the National NAGPRA Program website for the public.* Ms. Hutt stated for the first time, the Review Committee members and the public received materials electronically, and this process has proven successful thus far.
- *Clarification of information on repatriation grants, process, and timing of applications.* Ms. Hutt stated the grants information available on the website was updated. In addition, the National NAGPRA Program website features a “What’s New” section, which highlights new information for the entire program.
- *Description of Review Committee member nomination and selection process.* Ms. Hutt stated that the description was included in the responses to the GAO report.
- *Making NAGPRA at 20 symposium videos available to the public.* Ms. Hutt stated the *NAGPRA at 20* symposium was done in partnership with The George Washington University. The National NAGPRA Program and The George Washington University are working on ways to distribute the symposium videos. In addition, the National NAGPRA Program is working to find a way to broadcast the series of eight videos on NAGPRA, and is facing the challenges of large files and a limited budget. The program would be open to any suggestions from the Review Committee or public.
- *Written outline for decision-making process for Federal agencies.* Ms. Hutt stated that the outline, which she will draft for counsel review, will change with the passage of 43 C.F.R. 10.11. Ms. Hutt stated she hoped to have a draft for review at the November 2011 Review Committee meeting.
- *Finalize the study of decision making under 25 U.S.C. 3006 (c)(3), (4) & (5), by Ms. Sally Butts.* Ms. Hutt stated that this report is under review by counsel, and will be provided to the Review Committee and placed on the website when final.
- *Update the database and web report with information requested by Review Committee.* Ms. Hutt stated that this information was included in the FY 2010 Final Report. Ms. Hutt stated the National NAGPRA Program would be happy to receive and incorporate suggestions regarding the reports from the Review Committee.
- *Finalize the report on the status of NAGPRA compliance among museums with large collections of Native American human remains, by Ms. Lauren Miyamoto.* Ms. Hutt stated that this report is under review, and will be provided to the Review Committee and placed on the website when final.
- *Provide an update on the responses to the recommendations in the GAO report.* This item was on the meeting agenda.
- *Provide an update on DOI consultation policy development.* This item was on the meeting agenda.
- *Review and respond to a resolution of the Native American Repatriation Summit, presented by Mr. Ian Thompson, Choctaw Nation of Oklahoma at the November 2010 Review Committee meeting.* Ms. Hutt stated that in the resolution, which was authored by a several tribes and NATHPO, a number of points from

the GAO report were highlighted, and recommendations were made that address areas of concern. Ms. Hutt stated that some of the recommendations had been addressed by the Review Committee in their discussions, but added that the Review Committee might wish to review the resolution in consideration of their report to Congress for 2011. Ms. Hutt supplied copies of the resolution to the Review Committee members.

- Ms. Hutt stated that the Review Committee's draft Report to Congress for 2010 indicated that the National NAGPRA Program was asked to pull information from public presentations at past meetings concerning the successes and barriers to NAGPRA implementation. Ms. Hutt stated that the National NAGPRA Program would be happy to complete this homework assignment, and would just ask for a little direction regarding how many meetings to consider and what information to include.

Ms. Worl stated that the development of action items and review of those at the meeting was extremely helpful, and would be beneficial to continue for future meetings.

Action Item: Review of the Review Committee's Dispute Procedures and Findings Procedures

Mr. Hemenway summarized the subcommittee's discussions on the Review Committee's Dispute Procedures and Findings Procedures. Items discussed by the subcommittee, or the Review Committee as a whole, include:

- Determining time guidelines for presentations — perhaps 60 or 90 minutes per party — regardless of the number of individuals present; keeping in mind that a party may choose not to, or may be unable to, attend the meeting.
- Addressing special needs that might arise during presentations, such as accommodations for sacred items, by working with the parties prior to the meeting.
- Limiting "legalese" in communications and process, prior to and at the meeting. For example, rebuttal would be disallowed, either during the presentations or public comment periods.
- Limiting disputes to one per meeting day, with a maximum of two disputes at one meeting. Disputes would only be heard at face-to-face meetings, and not during teleconferences.
- Clearly differentiating findings of fact from the facilitation of disputes, to ensure understanding of both the process and the issues.
- Acknowledging that the circumstances of each dispute are unique situations in NAGPRA, in order to be mindful of all involved. Many disputes are the result of years of effort and work that ultimately result in unresolved issues and high emotions.
- Taking into account situations in which Review Committee members must recuse themselves. While this often happens at the outset, it may arise even after discussions have begun. In that case, a member should be able to call for a break in the discussions in order to determine his/her course of action. Reasons for this could include the need to follow cultural protocol.
- Soliciting feedback on the Review Committee's procedures from those having been a part of the dispute process (Indian tribes, museums and Federal agencies).

Ms. Worl asked counsel to clarify the process for notifying the Secretary and publication of recommendations and findings of fact in the Federal Register, as these processes appear to differ between the Review Committee's procedures and the regulations. Ms. Mattix stated that the current practice follows the Review Committee's procedures and basically truncates the process described in the regulations. Under the dispute procedures, the recommendations effectively go to the Secretary as a ministerial matter to be published in the Federal Register; however, the Secretary does not act on the recommendations. Ms. Worl stated that the process could be more clearly described in the Review Committee procedures.

Mr. Hemenway stated that the goal of the Review Committee is for parties to work together and come to an agreement through meaningful consultation and real communication. When that is not possible, and a dispute is the last option, the Review Committee needs to frame a workable process to aid all parties in successfully resolving the dispute.

Ms. Worl stated that based on the Review Committee's record of disputes, perhaps there are misunderstandings about what the dispute process can accomplish, given the Review Committee's current level of authority. Ms. Worl

recommended that the National NAGPRA Program analyze the dispute report to try to determine what improvements could be made in the process. Input from those who have participated in a dispute, as described earlier by Mr. Hemenway, could aid the analysis. Ms. Hutt stated that Ms. Butts did contact parties to past disputes as part of her follow-up process, and her final report will contain additional information from the draft report provided to the Review Committee at the November 2010 meeting. Ms. Hutt stated that, after reviewing the final report, the Review Committee members could forward any suggestions or comments to the DFO. Ms. Worl thanked Mr. Hemenway and Ms. Atalay for their hard work on this issue.

Report: Status Report on the Department of the Interior's Policy on Consultation with Indian Tribes

Mr. Simpson stated that the Presidential Memorandum of November 5, 2009, directed every Federal agency to develop a plan of action to implement Executive Order 13175 on government-to-government consultation. As a result, the Department convened a joint tribal/Federal working group, which included Mr. Wright, Jr., to develop that policy. In January 2011, the Department issued a draft policy for a 60-day comment period. The Department received responses from 22 tribes, containing approximately 300 comments. In response to the comments, the working group drafted changes to the policy and, in April 2011, sent a letter to the tribal leaders reporting on consultation, which included a list of the issues that were raised and a plan for public review of the proposed policy. On May 17, 2011, the Department published its proposed policy in the Federal Register for public review and comment, through July 18, 2011. Mr. Simpson stated that the policy is for the DOI and the various bureaus within the DOI — Bureau of Reclamation, Bureau of Land Management, Bureau of Indian Affairs, the Office of Surface Mining — to consult on any Departmental actions with tribal implications. That term is defined in the policy as “[a]ny Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on an Indian Tribe,” and does not include any matter in litigation or settlement negotiations, or activity done as a result of an administrative or judicial order. The policy has built-in procedures to keep it current and for continuous feedback, and will contain guidance for bureaus on how to carry out consultation in particular situations. The policy will be coordinated at the Department level by a new position, the Tribal Governance Officer.

Mr. Wright, Jr., stated the working group met in four face-to-face meetings, along with regular teleconferences. Mr. Wright, Jr., stated the working group carefully considered all of the submitted comments and the term described by Mr. Simpson, which could have wide variations in meaning from one agency to the next. The meetings were well attended by Federal agency and tribal representatives. The working group hopes to have the policy completed by September 2011. Mr. Wright, Jr., stated that one of the goals of those working on this policy is to ensure the participation of tribes throughout the consultation process, including decision making. Mr. Wright, Jr., stated that the President has heard loud and clear from tribal leadership that communication has been an area that has been ineffective, and so the hope is that the consultation policy is the start of good things.

Mr. Simpson stated that the policy includes three examples that fall under “Departmental action with tribal implications.” The first example of substantial direct effects may be on “Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on Federally managed lands,” in other words, some of the sacred sites information discussed earlier during the meeting.

Ms. Worl stated that Alaska Native corporations have a legislative requirement for consultation. Mr. Larry Echo Hawk, Assistant Secretary for Indian Affairs, announced he was moving forward with a bifurcated approach to the consultation process, and the consultation process will begin with the appointment of all of the individuals who will work with Assistant Secretary Echo Hawk.

Action Item: Appointment of the Subcommittee to Draft the Review Committee's Annual Report to Congress for 2011

Ms. Worl appointed Mr. Wright, Jr., and Mr. Barker as the subcommittee to draft the Review Committee's Report to Congress for 2011, for discussion and approval at the November 2011 meeting.

Action Item: Selection of Dates and Locations for the Spring 2012 and Fall 2012 Review Committee Meetings

Ms. Worl stated that the Review Committee rotates meeting locations throughout the different geographical regions of the United States. In consideration of past meeting locations, the spring 2012 meeting is due to be held in the Southwest.

Review Committee Motion

Mr. John made a motion to hold the spring 2012 meeting in Santa Fe, NM. Ms. Farm seconded the motion. The motion was adopted by unanimous vote (6-0).

The National NAGPRA Program staff proposed either May 9-10 or May 16-17, 2012, as potential dates for the spring 2012 meeting. The Review Committee members indicated that either of those dates was acceptable, and that the National NAGPRA Program could work on the meeting venue and details.

After discussion of the fall 2012 meeting, the Review Committee proposed that the National NAGPRA Program work toward a meeting in Hawaii on November 28-29, 2012. Ms. Hutt stated the National NAGPRA Program would be happy to move forward with the Review Committee's choices, provided the budget accommodates the request.

Presentation: Update by the Peabody Museum, Harvard University on NAGPRA Implementation Generally and Implementation of the Rule on Culturally Unidentifiable Human Remains (43 C.F.R. 10.11) in Particular

Presentation – Ms. Diana Loren

Ms. Diana Loren, Associate Curator, Peabody Museum of Archaeology & Ethnology, stated that the Peabody Museum has committed significant resources, expertise and attention over many years in a good-faith effort to implement NAGPRA and cultivate the respectful relationships necessary to this effort. The Peabody Museum partners with Native American communities and other institutions across the U.S. to work toward successfully achieving mutual goals of education and research. The Peabody Museum is responsible for one of the largest and broadest collections subject to NAGPRA, including the newest rule at 43 C.F.R. 10.11.

The Peabody Museum has completed the requirements to enable repatriation of approximately 3,100 individual human remains and over 10,000 funerary objects, representing approximately 13 percent of the total number of human remains and funerary objects available for repatriation nationally. For culturally affiliated collections, physical repatriation has been completed for over 2,900 individual human remains, 3,900 funerary objects, 1 sacred object, 73 objects of cultural patrimony, and 18 objects that constitute both a sacred object and an object of cultural patrimony. During FY 2011, the Peabody Museum hosted three NAGPRA consultation visits with, separately, representatives from the Western Apache NAGPRA Working Group, Bear River Band of the Rohnerville Rancheria, California, and the Saginaw Chippewa Indian Tribe of Michigan. Two physical repatriation events took place in 2011; funerary objects and human remains were transferred to the Saginaw Chippewa Indian Tribe of Michigan, and human remains were transferred to the Tunica-Biloxi Indian Tribe of Louisiana. Three new Federal Register notices were published in FY 2011, enabling the repatriation of the human remains of three individuals and seven unassociated funerary objects.

Nationally, the Peabody Museum has engaged in the regulatory development process for the disposition of culturally unidentifiable human remains. The rule at 43 C.F.R. 10.11 continues to be of significant concern regarding the resources that will be required to implement it at the university level. The remains of nearly 7,000 individuals at the Peabody Museum, coming from almost every U.S. state, are impacted by the rule. The rule will also impact the Peabody Museum's ability to work towards mutual goals of education and research, and will require significant time to implement. For these reasons, the Peabody Museum appreciates the opportunity, and will submit a comment, to contribute to the ongoing dialogue about NAGPRA's implementing rules. The comments will detail Harvard's

concerns regarding the scope of the rule, consultation outlined in the disposition process, and the potential impact of imposed deadlines on the process. Ms. Loren thanked the Review Committee for the opportunity to speak.

Review Committee Questions and Discussion

Ms. Worl thanked Ms. Loren, and the Peabody Museum, for their regular updates. Mr. Wright, Jr., asked if the Review Committee could have a copy of the presentation. Ms. Loren agreed.

Action Item: Department of the Interior Consultation with the Review Committee on the Department's Discretionary Review of the Regulations Already Codified at 43 C.F.R. Part 10

Mr. Tarler stated that 2010 marked the twentieth anniversary of the passage of the NAGPRA statute, and 2011 marks the fifteenth anniversary of the effective date of the regulations implementing NAGPRA. The NAGPRA statute outlines the law, and the NAGPRA regulations outline the process to fulfill the requirements of the statute. After 15 years of use of the NAGPRA regulations by Indian tribes, Native Hawaiian organizations, museums and Federal agencies, the National NAGPRA Program and the Office of the Solicitor at the DOI agreed to a discretionary review of the regulations promulgated at 43 C.F.R. Part 10 to ensure consistency and clarity of NAGPRA compliance and the civil enforcement process. Mr. Tarler stated that, prior to the discretionary review, the National NAGPRA Program held listening sessions with NAGPRA practitioners in order to answer the two questions that are before the Review Committee at the meeting: First, should the rules already published at 43 C.F.R. Part 10 be amended at all? Second, if the answer is yes, then how (either generally or specifically) should the rules be amended?

Mr. Tarler stated that the National NAGPRA Program would accept written comments through the first of July, 2011. Ms. Mattix stated that the discretionary review will cover the entire slate of NAGPRA regulations, from the original regulations through the most recently published section at 43 C.F.R. 10.11. Ms. Mattix stated that the process is in its very earliest stages of pre-proposed rule. Mr. Tarler stated that the comments received to date by the National NAGPRA Program have been compiled into a bullet-point reference by Ms. Koscielski.

Ms. Farm stated the National NAGPRA Program had a listening session specifically with Indian tribal governments, and asked if one was held specifically with Native Hawaiian organizations. Mr. Simpson stated that the meeting with tribal governments, which has also been referred to as a listening session, was a government-to-government consultation under the Executive Order on Consultation. Individuals from Native Hawaiian organizations who requested to be part of that consultation meeting were asked to call into the public listening session, due to the government-to-government consultation nature of the meeting with the tribal governments.

Mr. Wright, Jr., stated that, based on the comments from the listening sessions, he felt the rule should be amended, and the Review Committee could itself discuss specific areas that should be considered for amendment. Ms. Worl stated the 90-day rule needs to be clarified. Ms. Worl asked for clarification of the comment in the bullet-point summary that recommended removal of Hui Malama I Na Kupuna O Hawai'i Nei from the regulations. Mr. Simpson stated he understood the thrust of the comment to be that recognition by name in the regulations may give undue significance to Hui Malama I Na Kupuna O Hawai'i Nei, which was specifically listed as a Native Hawaiian organization in the statute by Congress.

Ms. Farm asked for clarification of the process going forward. Mr. Tarler stated that if, after discretionary review, there is a decision to propose amendments to the NAGPRA regulations, the proposed regulations will be published in the Federal Register for public comment, at which time the Review Committee would have an opportunity to submit comments, both individually and as a committee.

Mr. Barker stated he felt it was important to amend certain portions of 43 C.F.R. Part 10. Apart from minor concerns, which have been addressed by a variety of sources, virtually all issues involve Section 10.11. Mr. Barker stated that the Section 10.11 provisions are problematic, and identified sections of the regulations with which he has concerns. First, the protections from liability for museums included in Section 7 of the Act are not explicitly extended under Section 10.11 of the regulations, so institutions might be placed in legal jeopardy for complying or not complying. Second, the provision in the Act and the regulations affording an opportunity for scientific study of

culturally affiliated human remains, if such study would be of major benefit to the United States, was not extended under Section 10.11 of the regulations, thus creating an odd situation. Culturally unidentifiable human remains are protected from scientific study, but culturally affiliated human remains are not. Third, there is a reversal in expectations of the regulations. The original regulations assume that museums are the appropriate repositories for human remains absent a claim, while the new regulations directly state that museums do not have a right of possession under any circumstances, unless that right of possession has been directly given to them by a lineal descendant or affiliated tribe. Mr. Barker stated that, in his opinion, museums are the appropriate repository until such time as a claim is brought.

Ms. Worl recommended that the Review Committee consider the regulations and the summary points from the listening session prior to the next meeting, at which time the Review Committee would again discuss the issue. Mr. Barker asked whether comments made by the Review Committee in November would be considered as part of the discretionary review. Ms. Hutt stated that the Review Committee members were absolutely free to structure their agenda, and make comments on items, as they choose. The National NAGPRA Program included information on the discretionary review of the 43 C.F.R. Part 10 in the Review Committee's regular updates, in order to allow the members time to prepare for this discussion. As stated by Mr. Tarler, the National NAGPRA Program and the Office of the Solicitor will consider comments received by the first of July, 2011, in the discretionary review. Any Comments received after that date would be considered as comments on any future proposed rule or package of rules, depending upon their timing.

Ms. Farm stated she would like to see clarification of Section 10.15, Limitations and Remedies, specifically the definition of a timely claim and how claims affect the process. Further, Ms. Farm asked that Section 15 be reviewed in conjunction with the 90-day rule to clarify for museums how the 90-day rule and the timely-claim rule work together.

Review Committee Motion

Mr. Barker made a motion that the Review Committee express its recommendation that the Department review 43 C.F.R. Part 10, particularly Section 10.11, based on the comments from the listening sessions and this Review Committee meeting. Mr. Wright, Jr., seconded the motion. The motion passed by a unanimous vote (6-0).

Public Comment

Ms. Margo Schwadron

Ms. Margo Schwadron, Archeologist and NAGPRA Coordinator, NPS Southeast Region, thanked the Review Committee for the opportunity to speak. Ms. Schwadron's presentation was prepared jointly by Ms. Schwadron and Mr. Ian Thompson, Choctaw Nation of Oklahoma. On behalf of the National Park Service's Park NAGPRA Program, and in partnership with the Choctaw Nation of Oklahoma, Ms. Schwadron stated she would like to share an overview of a recent successful repatriation that occurred within the NPS Southeast Region. On March 22, 2011, the largest repatriation in the NPS Southeast Region's history was completed when a total of 124 individuals and numerous associated funerary objects were brought home and reburied in their original resting places on Natchez Trace Parkway property. The effort began in 2009, and included numerous consultations. The Choctaw Nation of Oklahoma took the lead in the repatriation process, joined by other potentially affiliated southeastern tribes. The consultation process was viewed as an open dialogue between the tribes and the NPS, and the wishes and requests of the tribes were incorporated in all stages of the repatriation process. State of the art geophysical technology, including ground penetrating radar, 3D LiDar scanning, gradiometer and base station survey grade GPS was used to relocate the original burial locations and trenches from the 1950s and 1960s, in order to place burials and objects within their exact original orientations.

A significant coalition of southeastern tribes attended the reburial ceremony, including representatives of the Choctaw Nation of Oklahoma, Jena Band of Choctaw Indians, Louisiana, Choctaw Band of Mississippi, Muscogee (Creek) Nation, and Chitimacha Tribe of Louisiana. The tribes led the repatriation with a ceremony and the preparation of medicine, and directed the entire reburial process. Tribal Elders and Chiefs thanked the NPS for facilitating the reburial, and asked that the NPS continue to work with the tribes. The tribes were especially appreciative of the new technology that enabled accurate reburial placement, and expressed interest in learning more about this process for future work. Throughout the process, the NPS responded to requests by the tribes, including

the removal of outdated and offensive NPS signage marking burial locations, the removal of a sidewalk that traversed the top of the mound site, the denial of public access to the top of the mound, and the revegetation of the mound site with native wild grass. The site is now deemed to be a sacred site, and will be protected from future disturbance.

Ms. Schwadron stated that the success of the repatriation was due to support from a network of NPS NAGPRA professionals at the National NAGPRA Program, Park NAGPRA Program, and Southeast Region of NPS, through internal project funding, grants, and training. Ms. Schwadron thanked all those involved for making repatriations such as this possible.

Ms. Worl stated this was a wonderful model, which encompassed some very sensitive issues, and asked if the repatriation could be highlighted on the National NAGPRA Program website. Ms. Schwadron stated she would work with the tribes to see if that would be possible.

Ms. Bambi Kraus

Ms. Bambi Kraus, Tlingit from Kake, AK, Director of the National Association of Tribal Historic Preservation Officers (NATHPO), thanked the Review Committee for the opportunity to speak, as well as the National NAGPRA Program and hosts of the meeting. Ms. Kraus presented information on what NATHPO considers to be barriers to implementation of NAGPRA. The first barrier is the unidentifiable human remains, for which the burden is on tribes to try to identify collections. This process can be exhausting, time-consuming and expensive. Another barrier is the “undetermined” collections, for which cultural affiliation has been determined but repatriation has not yet occurred. A third barrier is the large amount of catalogue numbers in the Smithsonian Institution collections, which will be another time-consuming and expensive process for tribes to review. Ms. Kraus stated that NATHPO was interested in recommending that the GAO look at museums in terms of their NAGPRA work. One issue to be considered is the large number of Federal funds, \$33 million in NAGPRA grants to museums and Indian tribes, which could be evaluated.

Ms. Kraus thanked the National NAGPRA Program for posting meeting information electronically on the website, as well as the decision to post the Review Committee’s past deliberations and other background information on the website. In addition, Ms. Kraus stated she hoped information provided to the Review Committee at meetings would be added. Ms. Kraus stated that she has heard some concern about digitizing and posting the original inventories and summaries on the website, as they contain very sensitive information, including site records, locations and items. Ms. Kraus urged tribal consultation on the issue before any final decisions are made.

Ms. Kraus asked for clarification of follow-up actions from the disputes heard at the November 2011 meeting. Ms. Mattix replied that the course of action regarding these disputes is under review at the Department. Ms. Kraus stated that the current Review Committee charter states that the National NAGPRA Program Manager is to serve as Designated Federal Official (DFO) for the Review Committee, a function currently fulfilled by Mr. Tarler, and asked for clarification. Ms. Hutt stated that although the charter does place that function with the Manager of the National NAGPRA Program, the Associate Director of the NPS, to whom Ms. Hutt directly reports, has appointed another individual to fill that function. That practice is consistent with the charter, and has been in place for Mr. Tarler’s service as DFO, as well as for the prior DFO. Ms. Hutt stated she is comfortable with that decision as it allows one person (Mr. Tarler) to run the Review Committee’s meeting and another (Ms. Hutt) to concentrate on the substantive issues. Ms. Kraus stated the Review Committee might consider putting that clause back into the charter. Ms. Worl thanked Ms. Kraus for her comments.

Mr. Wright, Jr., stated that, with regard to Ms. Kraus’s comments on the charter and the DFO, amending the charter to reflect an accurate operational function of the National NAGPRA Program would add clarity and eliminate speculation about program operations. Mr. Wright, Jr., stated that it may be helpful to have the recordings available online for past meetings to ensure accurate preservation of the record, with regard to the decisions made on the two disputes at the November 2010 meeting. Mr. Wright, Jr., stated that the Review Committee has raised questions as to why the Secretary does not respond in a timely manner to Review Committee recommendations, not just with regard to the disputes heard at the November 2010 meeting, but also at the October 2009 meeting in Sarasota, FL.

Ms. Hutt stated that the Review Committee meetings are recorded and those recordings are archived. Ms. Koscielski produces a verbatim transcript of every meeting from the recording, and then reduces the transcript to meeting

minutes. The Review Committee members receive an electronic copy of the minutes for their review, along with a copy of the transcript for comparison and reference. The minutes are signed by the Chair of the Review Committee, after the review and comments by all members. Ms. Hutt stated that if any member has a question about what is contained in the minutes or transcript, the recordings are available for confirmation. Ms. Hutt stated that throughout her years of work with the National NAGPRA Program, the Review Committee has consistently agreed that the transcript and minutes accurately reflect the Review Committee meetings. Ms. Hutt stated that the minutes and recent transcripts are available electronically on the National NAGPRA Program website. Past transcripts are available upon request to the program. Ms. Hutt stated that the National NAGPRA Program strives to keep the National NAGPRA Program website current, with up-to-date information on upcoming meetings, trainings, events, and staffing.

Ms. Mattix summarized the process following a decision by the Review Committee under Section 8(c)(3), findings of fact, or Section 8(c)(4), dispute recommendations. The Review Committee's recommendations are advisory, and are final once they are made by the Review Committee. As past practice, the Department has received those recommendations and, as a ministerial matter, published them for the public in a Federal Register notice. The Secretary of the Interior does not enforce, or respond to, the recommendations. The National NAGPRA Program essentially puts the information in a Federal Register notice word-for-word, as discussed at the Review Committee meeting. At the November 2010 meeting, a number of ethics issues were raised, and publication of the notices for the disputes is under review both by the Departmental Ethics Office and the Division of General Law. Ms. Mattix stated that no decision has been made regarding whether the notices will be published.

Ms. Worl acknowledged Ms. Kraus's concern about digitizing and posting the original inventories and summaries on the National NAGPRA Program website. Ms. Hutt stated the program would proceed with the digitization project, as a good data management practice, and the advice on possible tribal consultation was very well taken. Ms. Worl asked Ms. Kraus for clarification of her comments regarding grant funding to museums and the GAO. Ms. Kraus stated that NATHPO was recommending that the GAO examine the repatriation work of museums, and added that a legal justification for GAO involvement is the fact that museums receive Federal funds in the form of NAGPRA grants.

Ms. Jacqueline Cook

Ms. Jacqueline Cook, Repatriation Specialist for the Confederated Tribes of the Colville Indian Reservation, thanked the Review Committee for the opportunity to speak. Ms. Cook stated that the Columbia Plateau Intertribal Repatriation Group consists of tribes and bands from the Columbia Plateau, located in the Pacific Northwest states of Washington, Idaho, and Oregon. These include: the Confederated Tribes and Bands of the Yakima Nation, Washington, the Confederated Tribes of the Umatilla Indian Reservation, Oregon, the Confederated Tribes of the Warm Springs of Oregon, the Nez Perce Tribe, Idaho, and the Wanapum Band of Priest Rapids, a nonfederally recognized group. These tribes have chosen to work together in matters of repatriation as descendant communities of the people who have lived on the Columbia Plateau from time immemorial. Ms. Cook stated that in November 2010, the Columbia Plateau Intertribal Repatriation Group provided testimony on positive experiences and barriers encountered in implementing NAGPRA. At this meeting, she wished to comment on the inconsistencies and confusions encountered with the Culturally Unidentifiable (CUI) Native American Inventories Database. Ms. Cook stated Ms. Hutt's comments earlier in the meeting regarding the databases were appreciated, and added that, hopefully, her presentation would clarify and reinforce the work of the National NAGPRA Program.

Ms. Cook listed some challenges encountered in working with the CUI Database: individuals listed on multiple databases; new databases being created unbeknownst to institutions or affected tribes; lack of updates on the databases when information about collections is updated, for example, regarding control or affiliation; incorrectly listing collections that are not subject to NAGPRA; and confusing database fields, for example, "last updated" with no clear explanation for what that means. Ms. Cook stated that all of the data presented should be in true databases, with searchable and linkable information, and not Word tables. Ms. Cook commended the National NAGPRA Program for their hard work and diligence in completing the CUI Database, and acknowledged that such information constantly changes. Ms. Cook stated that the Columbia Plateau Intertribal Repatriation Group would recommend that the National NAGPRA Program make every effort necessary to update the accuracy of the CUI database, due to its increased use following the passage of 43 C.F.R. 10.11. Ms. Cook stated the Columbia Plateau Intertribal Repatriation Group offers these comments in the hope of improving accuracy, clarity, transparency, and ease of use of the data presented in the various databases.

Ms. Worl thanked Ms. Cook for her presentation, and stated the Review Committee appreciates the recommendations. Ms. Hutt thanked Ms. Cook and stated the National NAGPRA Program appreciates the feedback, which will be carefully considered, and hopes others feel comfortable bringing comments and concerns to the attention of the program. Ms. Hutt stated that putting information on the website provides transparency to all and allows discrepancies to be found and corrected. Working within staff limitations, the National NAGPRA Program will work as quickly as possible to update the database information and correct insufficiencies. Ms. Hutt stated that the National NAGPRA Program also looks for opportunities, such as the upcoming NATHPO conference, to publically display databases and allow public use and feedback.

Mr. Pete Jemison

Mr. Pete Jemison, Seneca Nation of New York, stated that the Haudenosaunee Standing Committee on Burial Rules and Regulations was formed in 1989, and represents the Tonawanda Band of Seneca Indians of New York, Cayuga Nation of New York, Onondaga Nation of New York, Tuscarora Nation of New York, and the Mohawk Nation. The tribal group chose to work as a confederacy on repatriation matters, and quickly discovered that some museums wanted to resist NAGPRA. To date, the Haudenosaunee Standing Committee has brought home the human remains of their ancestors, but many more still remain in boxes, stored in museums around the United States. The Haudenosaunee Standing Committee has been persistent in working with resistant museums and members of the museum community. Mr. Jemison described other barriers to NAGPRA implementation, including the challenge of the Haudenosaunee Standing Committee representing the confederacy tribes, which are located in both the United States and Canada. Mr. Jemison stated that although there is clearly one confederacy, consisting of tribes who preexist this country's boundaries, an additional burden of proof applies due to member tribes being located on both sides of the border.

Mr. Jemison stated the proposed amendment to the definition of Native American, with the addition of the language "or was", would enable human remains currently in limbo to be repatriated to contemporary Native nations. Mr. Jemison described a recent repatriation effort in West Virginia, for which the Haudenosaunee Standing Committee worked with the Eastern Band of Shawnee, and the challenges encountered during the process, due in large part to West Virginia state law. Mr. Jemison stated that consultation should be conducted in a face-to-face manner and should involve the opportunity to ask questions and receive responses.

Mr. Mervin Wright, Jr., on behalf of the San Carlos Apache Tribe

Mr. Mervin Wright, Jr., stated he was asked by Ms. Vernalda Grant from the San Carlos Apache Tribe to share a letter at the Review Committee meeting. The letter was addressed to Secretary Salazar and described the tribe's opposition to the National NAGPRA Program's policies that, one, permit museums to refer to objects claimed under NAGPRA as cultural items instead of by specific category (unassociated funerary objects, sacred objects, and/or objects of cultural patrimony) in Notices of Intent to Repatriate, and two, prevent the NAGPRA Review Committee from hearing requests on repatriation and the repatriation process if claimed items have been obtained prior to the Review Committee meetings.

Ms. Worl thanked Mr. Jemison for his comments and she stated the subcommittee on procedures discussed the use of the term "cultural items," and in recognition of tribal concerns brought before the Review Committee, decided to forego use of the term "cultural items" in the Review Committee procedures.

Closing Comments

Mr. Tarler stated he would again like to thank the hosts for the meeting for their warm welcome and generous hospitality. Ms. Worl thanked the Review Committee members for their hard work, and once again welcomed the new members. Ms. Worl thanked the National NAGPRA Program staff for their work and support.

Meeting Adjournment

Mr. Jemison offered a traditional closing. The meeting was adjourned at 9:55 a.m., Wednesday, June 22, 2011, by Ms. Worl.

Certified –

Signed _____

Mr. David Tarler,
Program Officer, National NAGPRA Program
Designated Federal Officer, Native American Graves Protection
and Repatriation Review Committee

September 20, 2011 _____

Date

Approved on behalf of the Review Committee –

Signed _____

Ms. Rosita Worl
Chair, Native American Graves Protection
and Repatriation Review Committee

September 22, 2011 _____

Date